IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM
NO. 77-1841

In the Matter of the Application of

PETER TORO,

Petitioner,

-against-

BENJAMIN J. MALCOLM, as Commissioner of the Departmment of Correction of the City of New York, and HARRISON J. GOLDIN, as Comptroller of the City of New York,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Questions Presented

Petitioner, a Correction Officer with the Department of Correction of the City of New York, was convicted after a trial before a jury of having committed a felony. He was advised that his position

was terminated by operation of law (Public Officers Law, §30).

Upon the reversal of petitioner's felony conviction, he was reinstated in his former position. Petitioner seeks his salary for the time between his felony conviction and his reinstatement, a period during which he was not employed.

Petitioner attempts to raise the constitutional issue of unequal protection of the law, an issue not considered by the State Courts in making their determinations.

The questions presented are:

1. Did petitioner preserve for review by this Court the question of the constitutionality of Public Officers Law, Section 30?

2. Has petitioner established a violation of his right to equal protection?

Statement of the Case

(1)

Petitioner was appointed as a Correction Officer of the New York City Correction Department on September 8, 1969. On August 30, 1971, petitioner was arrested and charged with burglary, petty larceny and impersonating a police officer. He was thereupon suspended by the Department of Correction.

On March 23, 1973, petitioner was found guilty after trial. He was sentenced on May 24, 1973 to a maximum term of four years. By letter dated October 4, 1973, petitioner was notified that, pursuant to Public Officer's Law, Section 30, his position of correc-

tion officer was vacated effective May 24, 1973 by virtue of his conviction and sentencing for the crime of burglary third degree.

By order entered May 20, 1974, the Appellate Division, Second Department, reversed petitioner's conviction and dismissed the indictmment.* The Department of correction reinstated petitioner in his position of correction Officer as of June 24, 1974.

(2)

By letter from the Legal Division of the Department of Correction dated May 1, 1975, petitioner was advised that he was not entitled to salary from the date of sentence to the date of his reinstatement because his position had

*People v. Toro, 44 AD 2d 848 (2nd Dept., 1974); Petition pp. 10-13.

been vacated during that period pursuant to Public Officer's Law, Section 30.*

Thereupon petitioner on May 8, 1975, commenced a proceeding in the nature of mandamus to compel payment of his allegedly due back salary. That proceeding was dismissed on motion by

*According to Matter of Keogh v. Wagner, 20 AD 2d 380 (1st Dept., 1964), affd. 15 NY 2d 569 (1964), a conviction resulting in the vacation of an office pursuant to Section 30 of the Public Officers Law does not become effective until judgmment of sentence has been pronounced. However, in Thaler v. State of New York, 79 Misc 2d 621 (Ct. Cl., 1974), it was held that with the change in CPL 1.20, subdivision 13, effective September 1, 1971, conviction occurs at the time of the jury verdict of guilty. Since the Department of Correction had advised petitioner that he had been convicted as of the date of his sentencing, that date was accepted for purposes of appeal in the New York courts.

order dated July 18, 1975, based upon petitioner's failure to file a notice of claim as required by Section 394a-1.0(a) of the Administrative Code. Petsitioner filed a notice of claim on August 8, 1975.

In the instant action, petitioner contended that he was entitled to his back salary by virtue of subdivision 3 of section 75 of the Civil Service Law (13).

Decisions Of The New York Courts

(1)

Special Term held, in pertinent part, that (46):

> "The reversal, on appeal, of petitioner's conviction because of mistaken identity differs in no way from a situation where at the end of a trial he was acquitted by virtue of such mistaken identity. To distinguish between these two exonera-

tions on the same underlying factual basis would merely result in a distinction without a difference. Since Section 75 subdivision 3, New York State Civil Service Law mandates a restoration to a former position with fully pay for the period of suspension less certain deductions, the determination initially rendered herein is modified to the extent of directing respondents to pay to petitoner his back pay for the period in question, less any monies earned during said time."

(2)

The majority in the Appellate Division affirmed, holding that petitioner was entitled to back pay for the entire period from his initial suspension until the date of his reinstatement, less 30 days.*

Conceding that "conviction of a public officer vacates his office and

*56 AD 2d 796 (1st Dept., 1977); Petition pp. 16-19.

that reversal of the conviction does not work an automatic reinstatement" it nevertheless questioned whether petitioner could, and should, not be paid for the period involved after it was determined that his criminal conviction was erroneous. The majority stated that while other states have split on the question, there was no direct ruling on the point in this state.

The Court concluded:

"Public Officers Law, §30, subd. 1(e), requiring vacation of an office upon conviction is silent whether an officer whose position is so vacated should be paid should his conviction be reversed and the charge dismissed. The court stated in Jerry, [Matter of Jerry v. Bd. of Ed., 35 NY 2d 534 (1974)] 'Compensation is a matter of such substantive right on the part of the teacher that we conclude that it cannot be taken away from him except pursuant to explicit statutory authorization.' If true there,

how much truer here where the petitioner has been trapped by a miscarriage of justice."

The two dissenting justices differed from the majority in that they would not have allowed petitioner "any back pay for the period after May 24, 1973, the date of his felony conviction." They stated in part:

> "Obviously, petitioner has suffered a great injustice. However, with respect to the period following his conviction, the controlling authority is that on conviction of a felony - rightly or wrongly - a public office is vacated under the provisions of Public Officers Law § 30 subd. 1 (e). In Matter of Obergfell, 239 N.Y. 48, 50 (1924), the Court of Appeals said:
>
> 'The abridgmment of the term upon the conviction of the incumbent is not a punishment for his offense. . . . It is an automatic limitation upon the duration of his office. . . . The application of the statute is not

defeated by the possibility that the judgment may be reversed.'

This is an 'abridgment' of the term of office. Even a reversal of the conviction does not work an automatic reinstatement. Matter of Pauley v. Noeppel, 1 Misc. 2d 928, 931 (Sup. Ct., Erie Co. 1953). Thus, from the time of his conviction of the felony until his reinstatement following reversal, petitioner was not a correction officer and the City was without power to pay him, or to permit him to render services as a correction officer. His office was vacated by operation of law."

(3)

The New York Court of Appeals in a 5 to 2 decision modified the order of the Appellate Division by holding that petitioner was not entitled to backpay for the period after May 24, 1973, the date his office as a Correction Officer became vacant.*

* _____NY 2d_____ (March 29, 1978); Petition pp. 20-28.

The majority in the Court of Appeals by Judge Jasen stated:

> "We hold that a public officer whose felony conviction is reversed on appeal and who is voluntarily reinstated is not entitled to recover backpay for the period between his conviction and voluntary reinstatement.
>
> The directive contained in section 30 of the Public Officers Law is clear and unqualiified: every public office becomes vacant upon the officer's conviction of a felony. A conviction of the incumbent constitutes an abridgement of the office, automatically terminating its duration. (Matter of Obergfell, 239 NY 48, 50; Breslin v. Leary, 35 AD 2d 794, 795; see generally, 3 McQuillin, Municipal Corporations, pp. 432-433.) It follows that once an office becomes vacant, the contingency of reversal of the judgment of conviction does not defeat the operation of this statutory directive. (Matter of Obergfell, supra; Ann, Officers - Conviction of Crime, 71 ALR 2d 593, 600.) Nor

does the actual reversal of the judgment of conviction require the reinstatement of the former officer (Breslin v. Leary, 35 AD 2d, at p. 795, supra; Matter of Smith v. Noeppel, 204 M 49, 51; Matter of Pauley v. Noeppel, 1 M[isc] 2d 928, 931; Matter of Tourjie v. Noeppel, 120 NYS 2d 478, 482), and the award of back-pay for the intervening period (Breslin v. Leary, 35 AD 2d 794, supra; 15 Op. State Compt. 437 [1959]).

As a matter of policy, the Legislature did not choose to provide merely for suspension from office upon an officer's conviction of a felony, but chose instead to declare the office vacant upon conviction. Hence, during the hiatus between petitioner's vacatur of office and voluntary reinstatement, he was not a Correction Officer, nor did he render services as a Correction Officer. Absent his continued status as a Correction Officer, no statutory authority exists for the payment of petitioner's salary, or to permit him to render services as a Correction Officer. (See Matter of Davis v. Impelliteri, 197 M[isc.] 162, 164).

The automatic termination of a public office upon the officer's conviction of a felony is not a punishment meted out in consequence of the conviction. (Ann, Officers-Conviction of Crime, 71 ALR 2d at p. 600, supra). But rather, it is a legislative decision borne of the recognition that a public officer's conviction of a felony does not permit the cessation of governmental functions for the period required to exhaust the appellate process. Continued performance of governmental functions necessitates the existence of a point in time at which the affected office may be filled without concern for the possibility that at some future date a former officer's conviction may be reversed. Certainly, a government agency should not be faced with the possible dilemma of having two officers for the same position."

The Court also stated:

"In weighing the interest of a public officer convicted of a felony, whether justly or unjustly, against that of the public, the balance must be struck in favor of the public's right to rest assured that its officers are individuals of

moral integrity in whom they may, without second thought, place their confidence and trust. (See Matter of Pauley v. Noeppel, 1 M 2d, at p. 931, supra; 30 Colum. L Rev 1045, 1050.) A felony conviction, notwithstanding its reversal on appeal, may in many cases shatter this ideal. To avoid this occurrence, we believe the Legislature has chosen to vacate a public office upon the officer's conviction of a felony. More than fifty years ago we so held in Matter of Obergfell (supra) and the Legislature has not changed or amended the substance of section 30 since our decision. In the face of this clear statutory directive, the courts lack the power to order the reinstatement of a former officer or an award of backpay based upon the subsequent reversal of the officer's convictions."

In his dissenting opinion, Judge Fuchsberg stated:

"The salutary effect on public confidence in government that flows from realization of the natural societal urge to return a falsely accused individual to his or her status quo ante is not to be underestimated. The

moral values so endorsed far outweigh the alarums sounded by the majority. So far as any dislocation of personnel is concerned, it would hardly call for much administrative ingenuity to arrange that appointment to a post vacated by an occupant whose case is still in the appellate process be conditioned on the possibility of a reversal. In Toro's case the reality not only is that his position remained available but that, having been vindicated on the merits, he was welcomed back with open arms. Certainly, in any event, 'the prospect of financial impact' should not 'dictate the outcome' (Brooklyn Union Gas Co. v. Human Rights Appeal Board, 41 NY 2d, 84, 90)."

RELEVANT NEW YORK STATUTES

PUBLIC OFFICERS LAW

"§30. Creation of vacancies

1. Every office shall be vacant upon the happening of one of the following events before the expiration of the term thereof.

* * *

e. His conviction of a felony, or a crime involving a violation of his oath of office;"

CIVIL SERVICE LAW

Subdivision 3 of Section 75 of the Civil Service Law provides in part:

"3. Suspension pending determination of charges; penalties. Pending the hearing and determination of charges of incompetency or misconduct, the officer or employee against whom such charges have been preferred may be suspended without pay for a period not exceeding thirty days. If such officer or employee is found guilty of the charges, the penalty or punishment may consist of a reprimand, a fine not to exceed one hundred dollars to be deducted from the salary or wages of such officer or employee, suspension without pay for a period not exceeding two months, demotion in grade and title, or dismissal from the service; provided, however, that the time during which an officer

or employee is suspended without pay may be considered as part of the penalty. If he is acquitted, he shall be restored to his position with full pay for the period of suspension less the amount of compensation which he may have earned in any other employment or occupation and any unemployment insurance benefits he may have received during such period. * * *"

POINT I

PETITIONER FAILED TO PROPERLY RAISE A SUBSTANTIAL FEDERAL QUESTION IN REGARD TO THE CONSTITUTIONALITY OF PUBLIC OFFICERS LAW, SECTION 30.

Althought petitioner attempts to rationalize their failure to do so, it is clear that none of the State courts considered constitutional issues in making the various determinations of this proceeding. As stated by this Court, it must be assumed that failure of the highest state court to pass upon such federal questions" was due

to want of proper presentation in the state courts, unless the aggrieved panty in this Court can affirmatively show the contrary". Street v. New York, 394 U.S. 576, 582 (1969).

In his Jurisdictional Statement to this Court (Petit., p. 1), petitioner states:

> "Due to the fact that the petitioner herein prevailed on the trial court level and thus was the respondent in each of the state court appeals the constitutional issues raised by the denial of back pay to Mr. Toro were not directly reviewed, although an equal protection rationale was employed by the Court of Appeals in both the majority and dissenting opinions."

Petitioner, at the outset, thus concedes that the constitutional issue attempted to be raised here was not considered by the State courts.

Petitioner's explanation that he was the respondent in the prior appeals is to no avail. He was in no way prevented from raising an equal protection argument in the trial court or in the Appellate Division.

Petitioner did attempt to raise the constitutional issue on his motion for leave to reargue in the Court of Appeals. The avowed purpose of such attempt was to create an issue that would be reviewed by this Court. The Court of Appeals by its denial of the motion rejected that proffer at so late a stage in the proceeding. In doing as the Court of Appeals was entirely justified. See Ellis v. Dixon, 349 U.S. 458 (1955), rehearing den. 350 U.S. 855 (1955).

Having failed to raise a federal or constitutional question in the state

courts, petitioner may not do so at this time. Ellis v. Dixon, 349 U.S. 458 (1955), rehearing den. 350 U.S. 855 (1955); Fuller v. Oregon, 417 U.S. 40, 50, (1974).

In Cardinale v. Louisiana, 394 U.S. 437 (1969), this Court stated (p. 438):

> "Although certiorari was granted to consider this question, the fact emerged in oral argument that the sole federal question argued here had never been raised, preserved, or passed upon in the state Courts below. It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions."

POINT II

PETITIONER HAS FAILED TO ESTABLISH A VIOLATION OF HIS RIGHT TO EQUAL PROTECTION.

Even if it were properly before this Court, which it is not, petitioner's

equal protection argument should be rejected.

Pointing out that there was no fundamental right to governmental employment per se, this Court in Massachusets Board of Retirement v. Murgia, 427 U.S. 307 (1976), stated at p. 313:

> "Accordingly, we have expressly stated that a standard less than strict scrutiny 'has consistently been applied to state legislation restricting the availability of employment apportunities.'"

The constitutional standard under the Equal Protection Clause here involved is "whether the challenged state action rationally furthers a legitimate state purpose or interest." San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 55 (1972); Dandridge v. Williams, 397 U.S. 471, 485 (1970); McLaughlin v. Florida, 379 U.S. 184 (1964). "A statutory dis-

crimination will not be set aside if any state of facts reasonably may be conceived to justify it." McGowan v. Maryland, 366 U.S. 420, 426 (1961).

Termination of a public office upon the conviction of its incumbent of a felony is provided for under the laws of numerous states (see 71 ALR 2d 593, collecting cases.) It is entirely justified and furthers a legitimate state interest. As stated by the majority in the Court of Appeals (Petit., pp. 23-24):

> "In weighing the interest of a public officer convicted of a felony, whether justly or unjustly, against that of the public, the balance must be struck in favor of the public's right to rest assured that its officers are individuals of moral integrity in whom they may, without second thought, place their confidence and trust."

Vacation of the office upon felony conviction is not a punishment, but only a recognition that governmental functions must continue while the appellate process is being exhausted. Since, after the conviction, petitioner was no longer a Correction Officer, he could not properly be paid.

CONCLUSION

The petition for certiorari should be denied.

August 1, 1978.

Respectfully submitted,

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